PP

v.

LOGARAJA RATNAM

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN JC
[CRIMINAL TRIAL NO: MT(3)45-12-2001]
15 SEPTEMBER 2004

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Prerequisites for - Prima facie case - Eye-witness evidence - Inconsistencies as to number of people present at crime scene - Failure to call material witness - Whether fatal - Whether evidence uncorroborated - Whether warranting acquittal - Penal Code ss. 34, 302 - Evidence Act 1950 s. 114(g)*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Murder - Whether prima facie case made out - Failure to call material witness - Whether attracting adverse inference - Penal Code ss. 34, 302 - Evidence Act 1950 s. 114(g)*

The accused, together with others still at large, were charged with the offence of murder under s. 302 of the Penal Code read with s. 34 thereof. It was not in dispute that the prosecution's case was substantially dependant on the evidence of an eye-witness ('PW8'). Before the learned judge, evidence was *inter alia* adduced that the deceased died as a result of head injuries suffered in a scuffle between two groups of people. According to PW8, about ten people armed with parangs and rottans had attacked him, the deceased and two others ('Kathiseran' and 'Ravindran') on the night in question. PW8 further testified that he saw the accused striking the deceased on the head with a parang, just before one of the attackers struck him on the face with a rottan causing him to lose consciousness. PW8, however, was inconsistent as to the number of people he and the deceased were with at the material time. Apart from Kathiseran dan Ravindran, he also mentioned 'Cheran' and 'Allagapan' and later on a few others. None of these named individuals were however called by the prosecution to give evidence, and that being so, a question arose as to whether a *prima facie* case of murder had been made out against the accused.

Held (acquitting and discharging accused):

[1] PW8's version of the attack on the deceased was not very clear and he appeared not to be able to remember the sequence of the attack well. The prosecution could have called Ravindran as a witness to clear any doubts arising from the evidence of PW8. The prosecution however chose not to, and thereby invited the risk of s. 114 of the Evidence Act 1950 being applied against it, since Ravindran was an eye witness to the attack and he was, according to PW8, seated between the deceased and PW8 just before the attack. (p 488 f-g)

[2] PW8 could not recall confidently the persons who were present at the scene of the attack. Further, it was doubtful whether he could have seen the attack on the deceased as he was struck first with a parang. His attention could have been diverted to his injury, the attack on him and to attempting to escape from being further attacked with everything happening in split seconds. (p 492 a-b)

[3] Ravindran, from whom the police had recorded a statement, was seated next to PW8 at the time of the attack and was himself attacked and injured in the attack, but was not called by the prosecution as a witness. The prosecution also did not call any of the other persons named by PW8 as having been present at the scene and at the time of the attack. That left PW8's evidence uncorroborated in material particulars. (p 492 f)

[4] PW9, the investigating officer, in his evidence, could not pinpoint who actually attacked and killed the deceased although PW8 had given him a statement on the day of the incident that the accused 'together with two or three persons' had attacked them with parangs. From this it would appear that PW8, when giving the statement, did not say to the police that he saw the accused attack the deceased. (p 492 h)

[5] The prosecution's evidence, upon a proper evaluation, left a reasonable doubt as to whether the accused was in fact involved in the attack that caused the death of the deceased on 5 March 2000, as PW8's recollection of those who were present with him at the time of the attack did not appear to be very reliable. He appeared to be confused about the incident. Doubt was also created by his narration of the sequence of the attack on him and the deceased. This led to a doubt as to whether in the circumstances PW8 had in fact seen the accused attack the deceased with a parang. The prosecution, further, had not established that the accused had acted in concert in furtherance of a common intention following a prearranged plan with the others who attacked the deceased. (p 493 a-c)

Case(s) referred to:
Chan Chun Ling & Anor v. PP [1956] 22 MLJ 34 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mahbuh Shah v. King Emperor AIR 1945 PC 118 PC ***(refd)***
PP v. Lee Hock Lai [2004] 1 CLJ 57 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code ss. 34, 302

For the prosecution - Suriyati Hashimah Mohd Hashim (Ahmad Akram Gharib)
For the accused - RA Kumar (K Sivarajendran Nair); M/s Nijar, Kumar, Netto & Partners

Reported by WA Sharif

JUDGMENT

KP Gengadharan JC:
The charge of murder against the accused was as follows:

> Bahawa kamu bersama-sama dengan beberapa orang yang masih bebas pada 5hb. Mac 2000 jam lebih kurang 5.45 pagi di persimpangan Jalan Joget 2 dan Jalan Joget 3, Taman Nesa, Skudai, di dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim, telah menyebabkan kematian Nagarajah a/l Munusamy KPT 791031-01-6245, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan (Akta 574) dan dibaca bersama-sama Seksyen 34 Kanun yang sama.

At the close of the prosecution's case, after considering the evidence and the submissions of the respective parties, I held that the prosecution had not made out a *prima facie* case and, consequently, acquitted and discharged the accused. The prosecution has now appealed against that decision.

Section 180 of the Criminal Procedure Code (CPC) sets out the procedure to be followed by the court at the conclusion of the prosecution's case as follows:

> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

In order to ascertain whether a *'prima facie'* case had been made out the court must undertake a maximum evaluation of the evidence adduced by the prosecution. However, the standard of proof required for this exercise at this stage is not one of being beyond reasonable doubt. (See *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734). In *Pendakwa Raya v. Lee Hock Lai* [2004] 1 CLJ 57 I was of the humble view that a maximum evaluation would require a " proper and complete evaluation of all the evidence adduced to determine whether a *prima facie* case has or has not been made out. Thus, all the evidence adduced has to be scrutinized properly and this should not be just a perfunctory cursory evaluation or an exercise of skimming over the surface of the evidence only. The prosecution must make out the ingredients of the charge with the evidence adduced. If the evaluation of the evidence results in doubts in the prosecution's case at this stage of the proceedings itself it cannot be said that a *"prima facie"* has been made out. The defence ought not to be called merely to clear or clarify the doubts. The benefits of the doubt, if any, at the end of the prosecution's case must go to the accused".

For a charge under s. 302 of the Penal Code to succeed the prosecution must prove the following:

(1) That the death of a human being has actually taken place;

(2) That such death has been caused by, or in consequence of, the act of the accused;

(3) That such act was done with the intention of causing death; or it was done with the intention of causing such bodily injury as:

(a) the accused knew to be likely to cause death; or

(b) was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause:

(a) death, or

(b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

In the present case there was no dispute that Nagarajah a/l Munusamy, the deceased stated in the charge, had died on 5 March 2000 as a result of head injuries.

The pathologist, Dr Shahidan bin Md. Noor (PW2), conducted a post-mortem on the body of the deceased which was identified to him by the deceased's brother (PW10) and by PW5, a policeman, on 5 March 2000 at about 3pm at the Hospital Sultanah Aminah, Johor Bahru. PW2 concluded in his report (P9) thus:

> there were a few incised wounds and lacerations on the head and the skull fractured at a few sites. These inevitably led to injuries and bleeding in the brain and ultimately caused the demise of this Indian male. The cause of death was given as head injuries.

PW2 told the court that the "incised wounds" referred to in the report (P9) could have been caused by any implement with a sharp edge as a sword, knife or sickle.

According to the testimony of PW2 the scalp of the deceased showed incised wounds and lacerations at a few sites and was of the view that the wounds on the head were sufficient to cause death. PW2 confirmed that almost all the wounds were to the back of the head of the deceased.

The prosecution sought to establish through the evidence of Vijayan (PW8) who claimed in his evidence to be an eye witness to the incident in which the deceased was killed that the accused together with others still at large caused the death of the deceased.

PW8 testified that on 4 March 2000 at about 11.30pm he together with some friends, including the deceased, went to a pub called "Rhythm Pub" in Perling, Johor. When he came out of the pub he witnessed a fight amongst several people in which the deceased and the accused were also involved. After that PW8 and his friends, including the deceased, went to Taman Nesa, Skudai where their homes were. Upon arriving at Taman Nesa they sat down near a culvert at the junction of Jalan Joget 2 and 3.

Whilst there, one of PW8's friends by the name of "Kathiresan" went to buy some food and then came back after going home to have his bath. PW8, too, went back to his house and then came back to the junction after having a shower. Then whilst he and his friends, including the deceased, were waiting for Kathiresan to return with the food PW8 saw the accused and several others (about ten altogether) believed to be the accused's friends come towards the

junction (where he and his friends were) on 4 or 5 motorcycles. PW8 then testified that he saw some of the persons who came on the motorcycles come towards him and his friends. They were armed with knives and rottans. The "knives" according to PW8 was a parang about 2 1/2 feet long. The accused was armed with a parang according to PW8. The accused and some of his friends then attacked PW8 and his group with the weapons that they had brought. PW8 testified that he was attacked by one of the accused's friends with the parang and he was slashed on shin of his left leg. According to PW8, after being slashed on his leg he saw the accused attacking the deceased from the back of the deceased. PW8 testified that the accused had charged towards the deceased and hacked the deceased on the neck with his parang. PW8 was then hit on the face by one of the accused's friends with a rottan and he then lost consciousness. He regained consciousness only in hospital. PW8 said that he could identify the accused as the one who attacked the deceased as the accused was not wearing any helmet and there were street lights at the place that enabled him to see the accused's face. PW8 has known the accused for about seven years before the incident as they both had worked together in Singapore.

Other than the deceased and PW8 a friend of PW8 named "Ravindran" who was sitting next to him at the junction when they were attacked also suffered injuries as a result of the attack. However, PW8 did not know who had actually attacked his friend, Ravindran. In cross examination, PW8 stated that the attack on the deceased was from the side whereas in his examination in chief he testified that he did not see the accused strike the "other parts of the deceased except the back of the head".

PW8's version of the attack on the deceased was not very clear and he appeared not to be able to remember the sequence of the attack well. The prosecution could have called Ravindran (who was just seated right next to PW8 when the attack on the deceased took place) as a witness to clear any doubts arising from the evidence of PW8 but chose not to and thereby invited the risk of s. 114 a of the Evidence Act being applied against it for not calling Ravindran as a witness. Ravidran was an eye witness to the attack on the deceased as he was, according to PW8, seated between the deceased and PW8 just before the attack.

In *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 (a case involving trafficking in dangerous drugs) the then Supreme Court speaking through Edgar Joseph Jr FCJ (as he then was) went to some length, in the judgment, to examine the need for the prosecution to call relevant witness in a criminal trial as follows:

We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.

On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for against the prosecution (per Lord Roche in the *Ceylon Privy Council Seneviratne v. R* [1936] 3 All ER 36 at p 49, applied in *R v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

In *R v. Nugent*, Park J sitting in the Central Criminal Court introduced an exception to the rule in Oliva, which says that if a potential witness concerned is capable of belief, then it is the prosecutor's duty to call the witness despite the fact that the testimony he will be giving will be inconsistent with the case the prosecution intends to prove (per Lord Parker CJ [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at pp 1035-1036). The exception introduced by Park J being that if in the circumstances the calling of the witness concerned by the prosecution would confuse the jury as to what it is that the prosecution are seeking to prove, then the prosecution would be under no duty to call the witness.

However, in the later case of *R v. Balmforth* [1922] Crim LR 825, the Court of Criminal Appeal in England (Staughton LJ, Mckinnon and Potter JJ), held that the earlier case of Nugent did not qualify the leading authority of Oliva being not an exception to the rule enunciated in Oliva, but merely an illustration of it. Accordingly, an appeal against conviction on a charge of wounding with intent was successful and the conviction quashed, where the prosecutor relying on Nugent elected not to call for examination or to offer for cross-examination by the defence a witness whom it conceded was capable of belief and whose testimony largely supported the defence case but, on at least one point, supported the prosecution case. The court appears to have held that once it is conceded that such witnesses capable of belief, it is the obligation of the Crown to at least tender him for cross-examination by the defence.

We note that in *R v. Harris* [1927] 2 KB 587 at p 590, Lord Hewart CJ, the presiding judge in the Court of Appeal in England, made the observation that, 'in criminal cases the prosecution is bound to call all the material witnesess before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury'.

We must mention, lest we be accused of an oversight, that in our search for authority, we have encountered and considered, the cases of *Adel Muhammed el Dabbah v. A-G of Palestine* [1944] AC 156; [1944] 2 All ER 139; *Richardson*

v. R [1974] 131 CLR 116 at pp 119-121 (High Court of Australia) and *R v. Apostilides* [1984] 154 CLR 563 at p 575 (High Court of Australia).

In *Adel Muhammed el Dabbah*, the court said, *inter alia*, that the prosecution had a complete discretion as to the choice of witnesses to be called, but qualified this by adding that it should be the general practice of the prosecution, if it finds no reason to the contrary, to tender such witnesses (witnesses whose name are on the back of the information) for cross-examination by the defence.

In *Richardson*, the High Court of Australia (at pp 119-120), gave general guidance to the prosecution as to how it was to approach its task as to the choice of witnesses to be called at the trial and mentioned as examples of factors to be taken into account for this purpose 'whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown'. The court then went on to say:

> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused.

And, after referring with approval to the statement by Lord Roche in *Seneviratne v. R* that:

> Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution ... .

Went on to add:

> to avoid any misapprehension we wish to make two observations about it [the statement by Lord Roche]. First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has got to call in the Crown case any eyewitness if he judges that there is sufficient reason for not calling him, as, for example, where he can prove that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

In Apostilides, the High Court of Australia (at p 575) said, *inter alia*, that a decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v. A-G of Palestine* [1944] AC 156 at pp 167-169; [1944] 2 All ER 139 at pp 143-144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less than a statutory duty the accused must be acquitted.

In the examination in chief PW8 stated that at the time of the attack whilst at the junction between the two roads there were four persons, including himself and the deceased, seated by a culvert. He named the other two as "Kathiresan" and "Ravindran". After PW8 went home for a bath and returned he stated that there were then six persons by the culvert, including himself. The additional two persons were named as Cheran and Allagapan. According to PW8 Cheran then went home and did not return and that according to PW8 left four persons when, infact with Cheran's departure there should be five persons left including himself. But in cross-examination PW8 stated that at the time of incident (attack) there were six persons including himself and he named the others as being the deceased, Ravindran, Cheran (who, PW8 had earlier testified, had left before the attack and did not return), Kathiresan and Allagapan. PW8 then at another stage of the cross examination added that another person by the name of "Jeganesan" (7th person) was also present together with the six persons he referred to earlier. Upon being questioned further PW8 confirmed that infact Cheran and Kathiresan were not present at the place at the time of the attack on the deceased. Further, he was not sure whether even Jeganesan was present.

In the examination-in-chief PW8 testified that the attackers who attacked his group whilst seated by the culvert came on four or five motorcycles and that there were about ten of them (attackers) altogether including the accused. PW8 only knew the accused and thus could only identify the accused as one of the attackers. PW8's recollection was that he saw the accused and the other attackers approach him and his friends holding parangs and rottans. PW8 then testified that he was attacked with a parang by one of the attackers and then saw the accused then strike the deceased with a parang just before one of the attackers struck PW8's face with a rottan causing him to lose consciousness only to regain it in the hospital. PW8 also stated that he did not know what happened to his friend, Ravindran, who was seated next to him and to the deceased (ie, between PW8 and the deceased) although, infact, Ravindran was also injured in that attack.

It appears from the evidence of PW8 that he cannot really recall confidently the persons who were present at the scene of the attack. Further, it is doubtful whether he could have seen the attack on the deceased as he was struck first with a parang. His attention would have been diverted to his injury, the attack on him and to attempting to escape from being further attacked with everything happening in split seconds. It was submitted on behalf of the accused by his learned counsel that the attention of PW8, upon being struck with a parang, would have been be focused on nothing else but on his self presentation and escape from the scene and urged the court to "picture a chaotic scene and the intense panic that must have ensued".

According to PW8 he was almost simultaneously (to the cut on his leg) also struck on the face with a rottan by another attacker thereby rendering him unconscious. He testified that it was between the time he was struck with a parang on his leg (shin) and the time he was struck across the face with a rotan that he saw the accused strike the deceased with a parang on the head. However, PW8 did not see Ravindran seated right next to him being attacked and injured. PW8, however, also stated that the attack lasted about five minutes which, by this own evidence of having passed out after being struck on the face with rottan following the cut to his leg with a parang, was an exaggeration.

Ravindran (from whom the police had recorded a statement) who was seated just next to PW8 at the time of the attack and who was himself attacked and injured in the attack was not called by the prosecution as a witness. It was submitted on behalf of the defence that Ravindran's evidence "by any reasonable stretch of the imagination would be crucial", and that he may have been a much better witness that PW8 who had passed out as a result of the attack. The prosecution did not call any of the other persons who were named by PW8 as having been present at the scene and at the time of the attack. That left PW8's evidence uncorroborated in material particulars.

PW9, the investigation officer, confirmed that from his investigations the death of the deceased was caused by more than one person. He agreed that the accused was arrested and charged because he was seen at the scene of the crime. He also confirmed that from his investigations he could not pin point who actually attacked and killed the deceased although PW8 had given him a statement on the day of the incident that the accused together with two or three persons had attacked them with parangs. From this it would appear that PW8, when giving the statement, did not say to the police that he saw the accused attack the deceased.

I carefully subjected the prosecution's evidence to a proper evaluation and found that the evidence adduced, essentially through PW8, left a reasonable doubt as to whether the accused was infact involved in the attack that caused the death of the deceased on 5 March 2000 as PW8's recollection of those who were present with him at the time of the attack did not appear to be very reliable. He appeared, to me, to be confused about the incident. Doubt had also been created by his narration of the sequence of the attack on him and the deceased. This led to a doubt as to whether in the circumstances PW8 had, in fact, seen the accused attack the deceased with a parang.

Further, even if the accused was at the scene of the attack or had come together with the others, still at large, who had attacked the deceased and caused his death there was a doubt as to whether accused was liable for the crime of murder by virtue of s. 34 of the Penal Code ie, whether there was a common intention amongst them, including the accused, to cause the death of the deceased in the attack.

As the charge against the accused was one of murder under s. 302 read together with s. 34 of the Penal Code the prosecution had to show that the accused together with the others still at large murdered the deceased in furtherance of a common intention of all of them which required a prearranged plan to commit the offence in concert.

In *Mahbuh Shah v. King Emperor* AIR 1945 PC 118 the Privy Council was of the view that:

> To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime maybe imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

(See *Chan Chun Ling & Anor v. PP* [1956] 22 MLJ 34)

It was submitted by the prosecution that there was infact a prior meeting of the minds amongst the accused and the other persons who were with him (who are still are large) to cause death or such bodily injury which was likely to cause death to the deceased and to the other friends of deceased, including

PW8. To support this contention the prosecution relied on the fighting that had occurred outside the Rhythm Pub in Perling before the murder of the deceased on 5 March 2000. However, PW8 testified that he saw the accused with some friends in the fight outside the pub and then later saw the accused with a group of people who came on motorcycles attack the deceased but PW8 did not know the persons who were with the accused both outside the pub and at the place where the deceased were attacked.

There was no evidence that the persons who were with the accused in the fight outside the pub were the same persons who came on motorcycles and attacked the deceased, PW8 and his friends. That being so, the prosecution had not established that the accused had acted in concert in furtherance of a common intention following a prearranged plan with the others who attacked the deceased. According to Ratanlal & Dhirajlal's *"Law of Crimes"* Twenty-Fourth Edition "common intention" implies:

> acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. This section embodies a principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of a common intention. It is well-settled that common intention in this section presupposes prior concert. It requires a pre-arranged plan because before man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and declaration made by them just before mounting the attack. There is a difference between 'same intention' and 'similar intention'. It is not enough to have the same intention independently of each other for fastening vicarious liability for the act of another, under section 34, IPC[5]. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict separate fatal blows and yet none would have the common intention required by the section because there was no prior meeting of minds to form a prearranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder, however clearly an intention to kill could be proved in his case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must be pre-arrangement and premeditated concert. It is not enough, to have the same intention independently of each other [6].

In all the circumstances, the benefit of the doubts that have arisen must be given to the accused. Thus, the prosecution, in my view, had not made out a *prima facie* case to warrant the accused's defence to be called.

Consequently, I acquitted and discharged the accused.